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SHASHI KUMAR SHANMUGAM & ORS v. KETUA POLIS NEGARA, POLIS DIRAJA MALAYSIA & ANOR

COURT OF APPEAL, PUTRAJAYA
HASHIM HAMZAH JCA
WONG KIAN KHEONG JCA
B WAN AHMAD FARID SALLEH JCA
[CIVIL APPEAL NO: W-01(IM)-562-10-2023]
10 JULY 2025

C **Abstract** – *(i) Under O. 53 r. 3(2) of the Rules of Court 2012, an application for leave for judicial review must be made ex parte and must be supported by a statement and by affidavits verifying the facts relied on. If the Attorney General ('AG') or his representative appears at the ex parte hearing for leave, his presence is to assist the court at the leave stage and not as a party to judicial review proceedings. The fact that the* D *AG happens to be the putative respondent does not convert an ex parte application into inter partes. It is not incumbent on the AG to file any affidavit in reply; (ii) It would be difficult to conclude that the AG's impugned decision in declining to initiate criminal proceedings is tainted with mala fide in the absence of any prima facie evidence, let alone* E *compelling evidence, that there was mala fide on the part of the AG in exercising his prosecutorial discretion; (iii) The power to prosecute does not lie with the Inspector General ('IGP') as he is not the decision-maker. In such scenario, the IGP is wrongly named as a party in an application for leave to commence judicial review.*

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ADMINISTRATIVE LAW: *Judicial review – Legality of decisions of public authorities – Challenge against decision of Attorney General ('AG') declining to initiate criminal proceedings against preacher allegedly making seditious remarks – Whether evidence of wrongdoing by preacher could be extended to manner AG* G *arrived at impugned decision – Whether there was prima facie evidence that impugned decision of AG tainted with mala fide – Whether there was appealable error which called for curial intervention.*

ADMINISTRATIVE LAW: *Judicial review – Legality of decisions of public* H *authorities – Challenge against decision of Attorney General ('AG') declining to initiate criminal proceedings against preacher allegedly making seditious remarks – Whether Inspector General ('IGP') wrongly named as party to application – Whether omission of IGP adversely affected appellants – Rules of Court 2012, O. 53 r. 2(4)*

I

ADMINISTRATIVE LAW: *Judicial review – Proceedings – Challenge against decision of Attorney General ('AG') declining to initiate criminal proceedings against preacher allegedly making seditious remarks – AG appearing as putative respondent – Whether converted ex parte application into inter partes – Whether incumbent on AG to file affidavit in reply – Rules of Court 2012, O. 53 r. 3(2) & (3)*

The appellants lodged a series of respective police reports against one Ustaz Mohd Syakir Nasoha ('Ustaz Mohd Syakir') in relation to a talk delivered by the latter in 2017 at a mosque in Sg Petani, Kedah. The talk was eventually uploaded to various social media platforms, including YouTube and TikTok. In delivering his talk, Ustaz Mohd Syakir allegedly spread hatred and insulted non-Islamic believers in Malaysia. The appellants took umbrage at the contents of the preacher's speech, which, according to them, had created hatred and provocation that was extremely negative and bordering on seditious. In a letter dated 17 June 2022, the Royal Malaysia Police ('PDRM') informed the Human Rights Commission of Malaysia ('SUHAKAM'), *inter alia,* that the investigation report had been forwarded to the Attorney General's Chambers ('AGC') on 13 December 2021. The letter stated that based on numerous police reports, the PDRM had commenced an investigation on Ustaz Mohd Syakir. The investigation was initiated under s. 505(c) of the Penal Code ('PC') and s. 233 of the Communications and Multimedia Act 1998 ('CMA'). Subsequently, an instruction was given by the AGC to take no further action ('NFA') on the case. The decision was made by the AGC because the viral parts of the preacher's talk, which were uploaded on social media, had been edited from the original recording. The contents of the talk, taken as a whole, was not considered to touch on religious sensitivities in Malaysia. Aggrieved by the Attorney General's ('AG') exercise of discretion, the appellants sought leave to commence judicial review proceedings at the High Court. In the judicial review, the appellants sought to quash the decision of the AG *qua* PP, made under art. 145 of the Federal Constitution ('FC'), who declined to initiate criminal proceedings against Ustaz Mohd Syakir pursuant to the police reports lodged by the appellants. The appellants also prayed for an order of *mandamus* to direct the AG and Inspector General of Malaysia ('IGP') to take action against Ustaz Mohd Syakir. The High Court, in refusing leave for the application to commence judicial review proceedings against the putative respondents, held (i) the police reports and edited videos uploaded from social media, without more, did not constitute compelling *prima facie* or convincing evidence to rebut the presumption of legality; (ii) the appellants failed to demonstrate that the AG *qua* PP, had acted *mala fide* in exercising his prosecutorial discretion when he classified the case as 'NFA'; and (iii) the appellants had improperly named the IGP as the putative first respondent when he was not the decision-maker of the impugned decision. Hence, this appeal. The appellants submitted that at the High Court, the AG had failed

to file any affidavit in reply ('AIR') to dispute the averments made by the first appellant in his affidavit in support ('AIS'). Thus, the application for leave to initiate judicial review should have been allowed.

Held (dismissing appeal)
Per Wan Ahmad Farid Wan Salleh JCA (for the majority):

(1) Under O. 53 r. 3(2) of the Rules of Court 2012 ('ROC'), an application for leave for judicial review must be made *ex parte* and must be supported by a statement and by affidavits verifying the facts relied on. The AG, if he decides to appear at the leave stage, does so by virtue of O. 53 r. 3(3). The ROC makes it mandatory for the statement and AIS to be served on the AGC. In short, if the AG or his representative appears at the *ex parte* hearing for leave, his presence is to assist the court at the leave stage and not as a party to judicial review proceedings. The fact that the AG happens to be the putative respondent does not convert an *ex parte* application into *inter partes*. Unless the court so directs, it was not incumbent on the AG, in his capacity as a putative respondent, to file any AIR and the failure to do so could not be construed as an admission of the facts so asserted in the AIS, in the context of the case of *Ng Hee Thoong & Anor v. Public Bank Bhd*. (paras 21-25)

(2) The appellants were preoccupied with the offence or offences allegedly committed by Ustaz Mohd Syakir when their main concern should be how the AG *qua* PP arrived at the impugned decision in not proceeding with the prosecution. Was the AG actuated by malice? Was there any attempt to obstruct a transparent investigation by the AG *qua* PP? Was there any attempt made by the appellants to communicate with the AGC with respect to the case, which was blatantly ignored? There were no such assertions in the AIS. Unfortunately, the appellants missed the wood for the trees. The evidence of the wrongdoings of Ustaz Mohd Syakir, if at all, could not be extended to the manner in which the AG *qua* PP arrived at the impugned decision. (paras 29-30)

(3) Upon receipt of the impugned letter, which was addressed to SUHAKAM and the attention of the first appellant, there was no evidence that the appellants had communicated with the AGC and made representations as to why Ustaz Mohd Syakir should have been prosecuted. In the absence of such assertions in the statement and AIS, it was difficult to conclude there was *mala fide* on the part of the AG *qua* PP. At its highest, even if it was presumed that the assertion in the statement and AIS was to be true, there was no *prima facie* evidence, let alone compelling, that the impugned decision of the AG *qua* PP was tainted with *mala fide* in order to rebut the presumption of legality. (paras 31 & 32)

(4) The IGP was wrongly named as a party in the application for leave. The IGP was not the decision-maker. The power to prosecute does not lie with the IGP. On the contrary, the PDRM had done its part in completing the investigation. There was nothing more the PDRM or the IGP could do. The appellants were not adversely affected by the decision or omission of the IGP within the meaning of O. 53 r. 2(4) of the ROC. This court did not find any appealable error on the part of the trial judge which called for a curial intervention. (paras 34 & 35)

Per Wong Kian Kheong JCA (dissenting):

(1) The 'low threshold' test (*ex parte* leave application) is to enable the High Court to sieve judicial review applications ('JRAs') and to ensure that frivolous, vexatious or baseless JRAs have not been filed. Herein, the High Court had failed to apply the 'low threshold' test. The 'low threshold' test had been fulfilled by the statement and the AIS: (i) the JRA was not frivolous, vexatious or baseless; and (ii) on a *prima facie* basis: (a) there was justification for argument on the hearing of the substantive JRA; and/or (b) there was some substance to support the JRA. (paras 47-49)

(2) It was clear from O. 15 r. 6(1) of the ROC that the *ex parte* leave application 'shall not be defeated by reason of the misjoinder' of the IGP as a putative co-respondent in the JRA and the court may still decide the issues in the JRA so far as they affect the rights and interests of the persons who are parties to the JRA. By virtue of O. 1A and O. 2 r. 1(2) of the ROC, having 'regard to the overriding interest of justice' and 'subject to the overriding objective of enabling the court to deal with cases justly', the *ex parte* leave application should not be dismissed merely on the misjoinder of the IGP as a putative co-respondent in the JRA. (para 51)

Case(s) referred to:

Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33 SC ***(refd)***

John Peter Berthelsen v. Director-General Of Immigration, Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 SC ***(refd)***

Law Society Of Singapore v. Tan Guat Neo Phyllis [2008] 2 SLR 239 ***(refd)***

Mohd Nordin Johan v. The Attorney-General, Malaysia [1983] 1 CLJ 130; [1983] CLJ (Rep) 271 FC ***(refd)***

Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 CA ***(refd)***

Nor Hazliza Ismail & Anor v. Mohamed Yusoff Shaik Madar [2024] 4 CLJ 353 CA ***(refd)***

Peguam Negara Malaysia v. Chin Chee Kow [2018] CLJU 1273; [2018] 1 LNS 1273 CA ***(refd)***
Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors [2016] 4 CLJ 510 CA ***(refd)***
Ramli Ghani v. Kementerian Kesihatan Malaysia & Anor [2022] 5 CLJ 518 FC ***(refd)***
Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 6 CLJ 199 FC ***(refd)***
Tuan Sarip Hamid & Anor v. Patco Malaysia Bhd [1995] 3 CLJ 627 SC ***(refd)***

Legislation referred to:
Communications and Multimedia Act 1998, s. 233
Criminal Procedure Code, s. 376
Federal Constitution, art. 145(3)
Penal Code, ss. 298, 298A, 505(c)
Rules of Court 2012, O. 1A, O. 2 r. 1(2), O. 15 r. 6(1), O. 53 rr. 2(4), 3(2), (3)

For the appellant - T Gunaseelan & Kumaradevan; M/s Gunaseelan & Assocs
For the respondent - Nur Idayu Amir, SFC & Imtiyaz Wizni Aufa Othman; FC

[Editor's note: For the High Court judgment, please see Shashi Kumar Shanmugam & Ors v. Ketua Polis Negara Polis Diraja Malaysia & Anor [2023] CLJU 2275; [2023] 1 LNS 2275 (affirmed).]

Reported by Suhainah Wahiduddin

JUDGMENT

Wan Ahmad Farid Wan Salleh JCA (Majority):

The Parties

[1] The first appellant is the President of an NGO, the Global Human Rights Federation. The second appellant is the President of the Sarawak Association of People's Aspiration. The third appellant is the President of a political party based in Sarawak, the Parti Bansa Dayak Sarawak ("PBDS"). The fourth appellant is the President of Persatuan Bekas Pelajar Berpendidikan Sekolah Cina Malaysia and the fifth appellant is the President of Pertubuhan Malaysia Tamilarr Munnetra Kalagam.

[2] The first putative respondent at the court below is the Inspector General of Malaysia, Malaysia ("IGP") and the second putative respondent is the Attorney General of Malaysia ("AG"). Pursuant to s. 376 of the Criminal Procedure Code ("CPC"), the AG shall be the Public Prosecutor ("PP") and shall have the control and direction of all criminal prosecutions and proceedings under the Code.

[3] The issue in the application for leave for judicial review before the High Court brought by the appellants concerns the exercise of discretion of the AG to institute, conduct or discontinue any proceedings for an offence under art. 145(3) of the Federal Constitution.

The Factual Background

[4] The appellants lodged a series of respective police reports against one Ustaz Mohd Syakir bin Nasoha ("Ustaz Mohd Syakir") in relation to a talk delivered by the latter in 2017 at Masjid Abu Bakar As-Siddiq, Bakar Arang, Sg Petani, Kedah. The talk was eventually uploaded to various social media platforms, including YouTube and TikTok.

[5] In delivering his talk, Ustaz Mohd Syakir allegedly spread hatred and insulted non-Islamic believers in Malaysia. The appellants took umbrage at the content of the preacher's speech, which, according to them, had created hatred, provocation that was extremely negative and bordering on seditious.

[6] In a letter dated 17 June 2022, the Royal Malaysia Police ("PDRM") informed the Human Rights Commission of Malaysia ("SUHAKAM"), *inter alia,* that the investigation report had been forwarded to the Attorney General's Chambers ("AGC") on 13 December 2021. The letter states that based on the Kuantan Rpt 17794/21 and numerous other police reports, the PDRM had commenced an investigation on Ustaz Mohd Syakir. The investigation was initiated under s. 505(c) of the Penal Code ("PC") and s. 233 of the Communications and Multimedia Act 1998 ("CMA").

[7] The PDRM letter further states as follows:

> Penyiasatan polis terhadap pengaduan tersebut telah selesai dijalankan. Kertas siasatan berkaitan telah dirujuk ke Jabatan Peguam Negara pada 13/12/2021 dan arahan agar kes di NFA (Tiada Tindakan Lanjut) kerana kandungan ceramah yang ditularkan adalah suntingan dari ceramah asal berdurasi 1:29:34 yang dibuat penama pada tahun 2017 di Masjid Abu Bakar, Bakar Arang, Sg Petani, Kedah. Dinilai dari keseluruhan konteks kandungan video ceramah asal tersebut tidak mengandungi sebarang kenyataan yang menyentuh sensitiviti agama di Malaysia.

[8] The letter was signed by SAC Mohamad Zainal bin Abdullah of the Prosecution and Law Division, Crime Investigation Department, PDRM. In short, the instruction from the AGC was to take no further action on the case. As stated in the letter, the decision was made by the AGC because the viral parts of the preacher's talk, which were uploaded on social media, had been edited from the original recording. The content of the talk, taken as a whole, was not considered to touch on religious sensitivities in Malaysia.

[9] Aggrieved by the AG's exercise of discretion, the appellants sought leave to commence judicial review proceedings at the High Court. In the judicial review, the appellants sought to quash the decision of the AG *qua* PP, made under art. 145 of the Federal Constitution, who declined to initiate criminal proceedings against Ustaz Mohd Syakir pursuant to the police reports lodged by the appellants.

[10] The appellants also prayed for an order of *mandamus* to direct the AG and IGP to take action against Ustaz Mohd Syakir.

A **At The High Court**

[11] The learned High Court Judge started with the general proposition that, notwithstanding art. 145(3) of the Federal Constitution, the recent developments in law seemed to suggest that in "appropriate, rare and exceptional cases", such an exercise of discretion of the AG is amenable to
B judicial review.

[12] Citing the judgment of the Federal Court in *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* [2021] 6 CLJ 199, the learned judge reiterated that an applicant in challenging the exercise of the AG's discretion
C under art. 145(3) must satisfy the two-step threshold as follows:

(i) first step threshold: The applicant needs to show that he has the legal basis to challenge the decision of the AG *qua* PP on the traditional grounds of judicial review, which, among others, includes illegality, procedural impropriety, irrationality and *mala fides*. The burden of proof
D lies on the applicant; and

(ii) second step threshold: The applicant needs to adduce a compelling *prima facie* proof that the decision or omission of the AG *qua* PP falls within one of the grounds or any of them. Once the threshold is crossed, the burden lies on the AG *qua* PP to justify his actions or inactions to the
E court.

[13] Applying the said proposition to the facts of the case as reflected in the affidavit in support of the application for leave, the learned judge held that the exercise of the discretion by the AG *qua* PP under art. 145(3) of the Federal Constitution is cloaked with the presumption of legality. It is
F therefore for the appellants to rebut this presumption.

[14] Having gone through the exhibits in the affidavit in support ("AIS") of the first appellant (who also affirmed the same on behalf of the remaining appellants), the learned judge found that:

G (i) the appellants must provide more than police reports and excerpts of the talk from social media by Ustaz Mohd Syakir to challenge the strong presumption of legality. According to the learned judge, the police reports and edited videos uploaded from social media, without more, did not constitute compelling *prima facie* or convincing evidence to rebut
H the presumption of legality;

(ii) the appellants had also failed to demonstrate that the AG *qua* PP, had acted *mala fide* in exercising his prosecutorial discretion when he classified the case as "NFA"; and

(iii) in addition, the appellants had improperly named the IGP as the
I putative first respondent when he was not the decision-maker of the impugned decision.

[15] For the said reasons, the learned judge refused leave for the application to commence the judicial review proceedings against the putative respondents.

At The Court Of Appeal

[16] Before us, learned counsel for the appellants attracted our attention that at the High Court, the AG had failed to file any affidavit in reply to dispute the averments made by the first appellant in his AIS. Relying on *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609; [1995] 1 MLJ 281, learned counsel for the appellants submitted that where one party make a positive assertion upon the material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.

[17] The extension of learned counsel's argument is that since there was no affidavit in reply by the AG disputing the facts so asserted in the AIS, the application for leave to initiate judicial review should have been allowed.

[18] Learned counsel contended that the AG's discretionary power is not absolute and he must act according to the law. Citing the judgment of the Singapore High Court in *Law Society Of Singapore v. Tan Guat Neo Phyllis* [2008] 2 SLR 239, learned counsel submitted that the prosecutorial power of the AG is subject to legal limits.

[19] The line of learned counsel's submissions is this. The AG *qua* PP does not have absolute or unfettered discretion under art. 145(3) of the Federal Constitution. Our attention was then attracted to the judgment of the learned Chief Justice in *Sundra Rajoo*, that "in appropriate, rare and exceptional cases, such discretion was amenable to judicial review".

[20] Learned counsel then further submitted that based on the excerpts of his talk as exhibited in the AIS, Ustaz Mohd Syakir had committed the following offences:

(i) under s. 298 of the PC for uttering words with deliberate intent to wound the religious feelings of any person;

(ii) under s. 298A of the PC for causing disharmony, disunity, feelings of enmity, hatred or ill will, or prejudicing the maintenance of harmony or unity on the grounds of religion;

(iii) under s. 505(c) of the PC for statements conducing to public mischief; and

(iv) under s. 233 of the CMA for improper use of network facilities.

Our Decision

[21] To put things in perspective, let us clarify that under O. 53 r. 3(2) of the Rules of Court 2012 ("ROC"), an application for leave for judicial review must be made *ex parte* and must be supported by a statement and by affidavits verifying the facts relied on.

[22] The AG, if he decides to appear at the leave stage, does so by virtue of O. 53 r. 3(3). This is so because the ROC makes it mandatory for the statement and AIS to be served on the AGC. In short, if the AG or his representative appears at the *ex parte* hearing for leave, his presence is to assist the court at the leave stage and not as a party to judicial review proceedings.

[23] However, if a judge is unsure whether there is an arguable case or not, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. However, the *inter partes* leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. This proposition can be seen in the judgment of the Supreme Court in *Tuan Sarip Hamid & Anor v. Patco Malaysia Bhd* [1995] 3 CLJ 627; [1995] 2 MLJ 442.

[24] What then is the role of the AG at the leave stage? The law can be seen in the judgment of this court in *Peguam Negara Malaysia v. Chin Chee Kow* [2018] CLJU 1273; [2018] 1 LNS 1273; [2019] 1 MLJ 307. In that case, this court made it abundantly clear that at the leave stage, the AG in the appeal was served not in his capacity as a respondent but in his capacity as the AG under O. 53 r. 3(3) of the ROC. The AG could choose not to appear, but when he appeared either by himself or the SFC, the court had no jurisdiction not to hear him.

[25] In short, the appearance of the SFC at the leave stage was by virtue of O. 53 r. 3(3). The fact that the AG happens to be the putative respondent does not convert an *ex parte* application into *inter partes*. Unless the court so directs, it is not incumbent on the AG, in his capacity as a putative respondent, to file any AIR and the failure to do so cannot be construed as an admission of the facts so asserted in the AIS in the context of *Ng Hee Thoong*.

[26] With the advent of *Sundra Rajoo*, it is now no longer in doubt that the AG *qua* PP does not have absolute or unfettered discretion under art. 145(3) of the Federal Constitution to institute, conduct or discontinue any proceeding for a criminal offence. As alluded to earlier, in appropriate, rare and exceptional cases, such exercise of discretion is amenable to judicial review.

[27] The Federal Court had outlined the two-step threshold as stated by the learned judge.

[28] In an application for leave for judicial review, unless they are inherently incredible or fundamentally frivolous, the facts so asserted in the statement or AIS are presumed to be true. For the purpose of discussion, let us assume for one moment that the appellants have the legal basis to challenge the impugned decision based on the traditional grounds of judicial review that it was irrational, unreasonable or lacked *bona fide* as reflected in para. 4 of the statement. The first-step threshold has been crossed.

[29] As to the second-step threshold, the appellants have to establish that compelling and *prima facie* proof that the decision of the AG *qua* PP falls within one of the traditional grounds. We have gone through the AIS of the first appellant and it seems to us that the appellants are preoccupied with the offence or offences allegedly committed by Ustaz Mohd Syakir when their main concern should be how the AG *qua* PP arrived at the impugned decision in not proceeding with the prosecution. Was the AG actuated by malice? Was there any attempt to obstruct a transparent investigation by the AG *qua* PP? Was there any attempt made by the appellants to communicate with the AGC with respect to the case, which was blatantly ignored?

[30] There were no such assertions in the AIS. Unfortunately, the appellants have missed the wood for the trees. The evidence of the wrongdoings of Ustaz Mohd Syakir, if at all, cannot be extended to the manner in which the AG *qua* PP arrived at the impugned decision.

[31] We hasten to add that, upon receipt of the impugned letter, which was addressed to SUHAKAM and the attention of the first appellant, there is no evidence that the appellants had communicated with the AGC and made representations as to why Ustaz Mohd Syakir should have been prosecuted.

[32] In the absence of such assertions in the statement and AIS, we find it difficult to conclude there was *mala fide* on the part of the AG *qua* PP. As we indicated earlier, at its highest, even if we presume that the assertion in the statement and AIS was to be true, there is no *prima facie* evidence, let alone compelling, that the impugned decision of the AG *qua* PP was tainted with *mala fide* in order to rebut the presumption of legality.

[33] In short, the second-step threshold has not been crossed. The learned judge was therefore correct in refusing leave for the appellants to commence judicial review.

[34] We also agree with the learned judge that the IGP was wrongly named as a party in the application for leave. The IGP was not the decision-maker. The power to prosecute does not lie with the IGP. On the contrary, the PDRM had done its part in completing the investigation. There is nothing more either the PDRM or the IGP could do. The appellants are not adversely affected by the decision or omission of the IGP within the meaning of O. 53 r. 2(4) of the ROC.

[35] For the said reasons, we do not find any appealable error on the part of the learned judge which calls for a curial intervention.

[36] In view of the public interest element in his appeal, we make no order as to costs.

A **Wong Kian Kheong JCA (Dissenting):**

Introduction

[37] My learned brother, Wan Ahmad Farid Wan Salleh JCA, had forwarded a draft judgment (draft) which proposed a dismissal of this appeal
B (this appeal).

[38] Hashim bin Hamzah JCA had agreed with the draft (majority decision). Regrettably, I have had the misfortune to dissent from the majority decision. With respect, I am of the view that this appeal should be allowed (dissenting opinion).

C **[39]** This judgment provides the reasons for my dissenting opinion.

***Ex Parte* Application In The High Court**

[40] The appellants (appellants) filed an *ex parte* application (*ex parte* leave application) for leave of the High Court to file a judicial review application
D (JRA) against the following two parties:

(i) the Inspector General of Police (IGP); and

(ii) the Attorney General (AG).

[41] The cause papers for the *ex parte* leave application were served on the
E AG's Chambers (AGC) pursuant to O. 53 r. 3(3) of the Rules of Court 2012 (ROC).

[42] On behalf of the AGC, the learned Senior Federal Counsel objected to the *ex parte* leave application (AGC's objection).

F **[43]** The High Court upheld the AGC's objection and dismissed the *ex parte* leave application with no order as to costs (High Court's decision).

[44] The High Court's decision is based on the following two reasons:

(i) the learned High Court Judge relied on the Federal Court's judgment delivered by Tengku Maimun CJ in *Sundra Rajoo Nadarajah v. Menteri*
G *Luar Negeri, Malaysia & Ors* [2021] 6 CLJ 199; [2021] 5 MLJ 209; and

(ii) the IGP was wrongly cited as a putative co-respondent in the JRA.

[45] Dissatisfied with the High Court's decision, the appellants filed this appeal.
H

What Is The Test To Decide An *Ex Parte* Leave Application (Test (*Ex Parte* Leave Application))?

[46] I am of the view that the test (*ex parte* leave application) is fulfilled if an applicant can satisfy a low threshold, namely, the applicant can fulfil the
I following two requirements:

(i) the JRA is not frivolous, vexatious or baseless; and

(ii) on a *prima facie* basis:

(a) there is justification for argument on the hearing of the substantive JRA – please refer to the Federal Court's judgment in *Mohd Nordin Johan v. The Attorney-General, Malaysia* [1983] 1 CLJ 130; [1983] CLJ (Rep) 271; [1983] 1 MLJ 68, at p. 274 (CLJ); p. 70 (MLJ); or

(b) there is some substance to support the JRA – please refer to the judgment of the Supreme Court in *Association Of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734; [1990] 1 CLJ (Rep) 33; [1990] 3 MLJ 228, at 229.

The following judgments of our apex courts (in chronology) support the above "low threshold" test (*ex parte* leave application):

(i) in *Mohd Nordin*, at p. 274 (CLJ); p. 70 (MLJ), Raja Azlan Shah Ag LP (as His Majesty then was) decided as follows:

> *We allowed the appeal and granted the appellant leave to apply for an order of certiorari because we are of the view that the learned judge was wrong in refusing leave as the point taken was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari.* (emphasis added)

It is to be noted that when *Mohd Nordin* was decided, our Parliament had abolished appeals to Privy Council for constitutional and criminal matters. In other words, when the Federal Court decided *Mohd Nordin*, the Federal Court was our apex court for criminal matters at that time;

(ii) in *John Peter Berthelsen v. Director-General Of Immigration, Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160; [1987] 1 MLJ 134, at p. 162; p. 135 (MLJ), Eusoffe Abdoolcader SCJ delivered the following judgment of the Supreme Court (our then highest court):

> *At the outset of the hearing of the appeal before us we were of the view ex facie that leave should in fact have been granted in the court below as the point taken by the appellant was not frivolous to merit refusal of leave in limine and justified argument on a substantive motion for certiorari. We accordingly applied and followed the procedure adopted by the Federal Court in Mohamed Nordin bin Johan v. Attorney General Malaysia [1983] 1 MLJ 68 (at page 70) and allowed the appeal, and granted leave to the appellant to apply for an order of certiorari.* (emphasis added)

(iii) according to Ajaib Singh SCJ in *Association Of Bank Officers, Peninsular Malaysia*, at p. 35 (CLJ); p. 229 (MLJ):

> *At the outset of the hearing of the appeal before us we indicated to the parties that we would hear submissions on the issue of leave only. After giving due consideration to the evidence in this case and the submissions advanced by the parties we were of the view that leave to apply for an order of certiorari ought*

to have been given. In his grounds of judgment the learned Judicial Commissioner had gone further than the leave stage and embarked on substantial issues on merit. We did not think that this was the right approach when the application for leave to apply for an order of certiorari is made. The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. On the evidence in this case we found that the appellants had prima facie an arguable case for the granting of the relief they were seeking. Their application was not frivolous or vexatious. There were grounds to consider the allegations made by the appellants and which could only be properly heard and determined on the substantive application for an order of certiorari after leave has been granted. (emphasis added)

(iv) in *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805; [2011] 6 MLJ 490, at [20], the following judgment of the Federal Court was delivered by Raus Sharif FCJ (as he then was):

[20] *It is clear from the above that a person who is adversely affected by the decision of a public authority can make an application for a judicial review of that decision. But the person must first obtain leave before his substantive motion can be heard. At the leave stage without the need to go into depth of the abundance of authorities, suffice for us to state that the threshold for the granting of such leave is very low. Leave is normally granted if the application is neither frivolous nor vexatious and it justifies further argument on a substantive motion (see Association of Bank Officers, Peninsular Malaysia v. Malaysian Commercial Bank Association [1990] 3 MLJ 228, Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor [1998] 1 MLJ 224, Mohamed Nordin bin Johan v. Attorney-General Malaysia [1983] 1 MLJ 68 and JP Berthelsen v. Director General of Immigration, Malaysia & Ors [1987] 1 MLJ 134).* (emphasis added)

(v) in the Federal Court case of *Ramli Ghani v. Kementerian Kesihatan Malaysia & Anor* [2022] 5 CLJ 518; [2022] 3 MLJ 674, at [52], Mohd Zawawi Salleh FCJ decided as follows:

[52] *It is a well-settled principle that, at the leave stage, which is the threshold stage, the court will not go into substantial issues on merits. All the applicant has to do is to follow the threshold requirement by showing a prima facie case and that the application is not vexatious or frivolous. There must be some substance in the grounds supporting the application. It is also important to note that the application for leave is procedural and not substantive and is merely to obtain permission to bring proceedings for a substantive hearing (see: Iki Putra bin Mubarrak v. Kerajaan Negeri Selangor [2020] 4 MLJ 213 at para 32; Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 3 MLJ 228 at p 229; Kamaruzaman bin Khalid*

v. YB Menteri Sumber Manusia [1997] MLJU 96 at para 2; Clear Water Sanctuary Golf Management Bhd v. Ketua Pengarah Perhubungan Perusahaan & Anor [2007] 6 MLJ 446 at p 457).

(emphasis added)

[47] The "low threshold" test (*ex parte* leave application) is to enable the High Court to sieve JRAs and ensure that frivolous, vexatious or baseless JRAs have not been filed – please refer to the Court of Appeal's judgment in *Nor Hazliza Ismail & Anor v. Mohamed Yusoff Shaik Madar* [2024] 4 CLJ 353; [2024] 4 MLJ 770, at [67(a)].

[48] With respect, in this case, the learned High Court Judge had failed to apply the "low threshold" test (*ex parte* leave application).

[49] I have perused the statement filed by the appellants (statement) pursuant to O. 53 r. 3(2) of the ROC and the affidavit which verified the contents of the statement under O. 53 r. 3(2) of the ROC (affidavit in support). I am satisfied that the "low threshold" test (*ex parte* leave application) had been fulfilled by the statement and the affidavit in support as follows:

(i) the JRA is not frivolous, vexatious or baseless; and

(ii) on a *prima facie* basis:

(a) there was justification for argument on the hearing of the substantive JRA; and/or

(b) there was some substance to support the JRA.

Whether The High Court Had Correctly Relied On *Sundra Rajoo*

[50] I am of the respectful view that the High Court had erroneously relied on the Federal Court's judgment in *Sundra Rajoo*. This is because in *Sundra Rajoo*, the Federal Court had decided the JRA on its merits after leave for JRA was previously granted by the Court of Appeal (which reversed the High Court's refusal to allow the *ex parte* leave application). Reproduced below is the relevant passage of the Federal Court's judgment in *Sundra Rajoo*, at [15]:

[15] *In any case, the appellant's application for leave to commence judicial review proceedings against the three charges was eventually dismissed. On appeal, the Court of Appeal held that the appellant had met the threshold for leave. The Court of Appeal reversed the High Court and the matter was remitted to the High Court for hearing of the substantive application before a different judge. The substantive judicial review application was heard and decided on 31 December 2019 pending which the criminal proceedings in the sessions court were stayed. The application for judicial review was allowed by the High Court. Aggrieved, the respondents appealed to the Court of Appeal. The appeal was allowed.*

(emphasis added)

A **Should The IGP Be Cited As A Putative Co-respondent In This JRA?**

[51] With regard to the learned High Court Judge's ground that the IGP should not have been made a putative co-respondent in the JRA, I am of the following view:

B (i) by virtue of O. 15 r. 6(1) of the ROC, "A cause or matter shall not be defeated by reason of the misjoinder … of any party, and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter";

C It is clear from O. 15 r. 6(1) of the ROC that the *ex parte* leave application "shall not be defeated by reason of the misjoinder" of the IGP as a putative co-respondent in the JRA and the court may still decide the issues in the JRA so far as they affect the rights and interests of the persons who are parties to the JRA – please refer to the judgment D of Abdul Rahman Sebli JCA (as he then was) in the Court of Appeal case of *Rajamani Meyappa Chettiar v. Eng Beng Development Sdn Bhd & Ors* [2016] 4 CLJ 510, at [102]; and

(ii) Order 1A and O. 2 r. 1(2) of the ROC provide as follows:

E *Regard shall be to justice*

O. 1A In administering [RC], the Court or a Judge shall have regard to the overriding interest of justice and not only to the technical non-compliance with these [RC].

F *O. 2 r. 1(2) [RC] are a procedural code and subject to the overriding objective of enabling the Court to deal with cases justly. The parties are required to assist the Court to achieve this overriding objective.* (emphasis added)

By virtue of O. 1A and O. 2 r. 1(2) of the ROC, having "regard to the overriding interest of justice" and "subject to the overriding objective of enabling the court to deal with cases justly", the *ex parte* leave G application should not be dismissed merely on the misjoinder of the IGP as a putative co-respondent in the JRA.

Outcome Of This Appeal

[52] Premised on the above grounds, I will allow this appeal with the H following order:

(i) the High Court's decision is set aside;

(ii) the *ex parte* leave application is allowed;

(iii) the JRA is to be remitted to the High Court to be heard on its merits before another learned High Court Judge or Judicial Commissioner; and I

(iv) no order of costs for proceedings in the Court of Appeal and High Court.